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Supreme Ct., U.S.
FILED
JAN 15 1993

NO. 92-6455

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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JERRY WAYNE SEWELL, II,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

* * * * * * * * * *

Petition for Writ of Certiorari to
United States Court of Appeals
For the Fifth Circuit

* * * * * * * * * * *

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

* * * * * * * * * * *

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ATTORNEY OF RECORD FOR
PETITIONER, JERRY WAYNE
SEWELL, II

OPINIONS BELOW

The opinion of the Court of Appeals is reported in United States v. Sherrod, 964 F.2d 1501 (5th Cir. 1992). The unpublished denial of Defendant-Petitioner's Petition for Rehearing was filed on August 3, 1992.

JURISDICTION

The Court of Appeals Opinion in this matter was filed on June 23, 1992. A timely Petition for Rehearing was filed on July 6, 1992, by Defendant-Petitioner, Jerry Wayne Sewell, II and Jerry Wayne Sewell, Sr. The Court of Appeals' denial of the Petitions for Rehearing was issued on August 3, 1992. The Court's jurisdiction is invoked under the following statutes and Rule 10 of the Supreme Court:

(1) Title 28, U.S.C. Section 125(1);

(2) The decision of the Fifth Circuit Court of Appeals is in conflict with the decisions of other United States Courts of Appeals on the same matter, to wit:

A. United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991); United States v. Jennings, 945 F.2d 129 (6th Cir. 1991), and United States v. Acosta, 963 F.2d 551 (2nd Cir. May 1992), which hold that the term "mixture" used in the United States Sentencing Guidelines Section 2D1.1 does not include unusable waste mixtures of controlled substances.

B. United States v. Perrone, 936 F.2d 1403 (2nd Cir. 1991), and United States v. De Noia, 451 F.2d 979 (2nd Cir. 1991), which hold that where the acts of a defendant in a narcotics conspiracy case are minimal, there must be independent evidence tending to prove the defendant had some knowledge of the broader conspiracy.

(3) The Fifth Circuit Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court and conflicts with the rationale of the decision of this Court in Chapman v. United States, 500 U.S. _____, 111 S.Ct. 1919 (1991).

REPLY TO GOVERNMENT ARGUMENT

In its argument in its Brief in Opposition, the Government errs in several points, and glosses over the facts in the record.

(1) In its first point of argument, at 8, the Government refers to Jerry Wayne Sewell, II's claim regarding outrageous Government conduct and states that two incidents mentioned in Jerry Wayne Sewell, II's Petition for Writ of Certiorari were not presented to the Court of Appeals for review. That is an error. The attached Exhibit 1-A, a copy of page 11 of Petitioner's Brief on Appeal clearly shows that these "incidents" were presented to the Court of Appeals. Further, Petitioner's claim of outrageous Government conduct does not focus on any one incident, but emphasizes it is the cumulative effect of the transgression by various law enforcement agencies and personnel.

For the Government to state in its first point of argument that the claim of outrageous Government conduct has been fully addressed in its Brief in Opposition in Cooper v. United States, cert. denied, No. 92-5991 (Dec. 14, 1992), fails to note the distinction made in Petitioner's Brief. The claim in Cooper focused on sentencing. Petitioner's claim includes the entire sequence of events which culminated in his conviction. Petitioner urges that the standard should be what would "shock the conscience" of a lay person. Who would say that it is acceptable to be convicted on the word of someone who has acknowledged that he is doing drugs during a relevant period he was testifying about? This fact and the long list of other facts presented in Petitioner's Petition for Writ of Certiorari constitute the cumulative effect of outrageous Government conduct which violated his right to a fundamentally fair trial.

(2) In its third point of argument, at 10, the Government states that Petitioner's claim of insufficient evidence is totally unpersuasive. What the Government relies on as persuasive is evidence of extraneous acts which were admitted over objection in trial and which were complained about in Petitioner's Appeal to the Court of Appeals. As

the Government states in its Brief in Opposition, at 11, the credibility of Danny Johnson as a reliable witness is crucial. Danny Johnson admitted taking dope on the trip to Bells, Texas when he was supposedly under the close supervision and surveillance of the Calcasieu Sherriff's Department or its representative. This was also before the Court of Appeals in Petitioner's first Brief, as can be seen in Exhibit 1-B, attached.

Further, in the Government's third point of argument, at ten, the Government misstates the evidence. In its Brief in Oppositition it stated that "shortly before this conspiracy began, Jerry travelled with his father, Petitioner, Jerry Wayne Sewell, Sr...." The record does not indicate a time frame. Petitioner, Jerry Wayne Sewell, II, complained about this and the admission over objection of extraneous acts because they were remote in time and therefore not relevant to the charge. Without the evidence of extraneous evidence, which were remote in time, and without the uncorroborated testimony of Danny Johnson, an admitted user of dope during this operation, by anyone's standard, there is insufficient evidence to sustain a conviction of Jerry Wayne Sewell, II, of a conspiracy.

CONCLUSION

For the reasons set forth above, and in Petitioner's Petition for Writ of Certiorari, a Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Appeals in this matter.

DATED: January 14, 1993.

Respectfully submitted,

Linda C. Cansler

LINDA C. CANSLER,
Attorney for Petitioner,
Jerry Wayne Sewell, II

witnesses such as Danny Johnson, Will Abshire, Darlene Roznovsky and Lisa Erwin, revealed that the only quantity referred to in the conspiracy was one pound of methamphetamine (Vol. 6/61, 87; Vol. 10/8, 111-113, 131; Vol. 12-A/74, 147; Vol. 14/65).

Prior to the execution of the search warrant, the culmination of events set in motion by Government witness, Danny Johnson, the case began as a local Calcasieu Parish, Louisiana investigation. Danny Johnson, a dope-snorting, snitching pimp, became an informant for the Calcasieu Parish Sheriff's Office, working with a paid "undercover agent", Will Abshire, who was not a commissioned law enforcement officer for the Calcasieu Parish Sheriff's Department. Danny Johnson approached Will Abshire to become an informant to work off some drug charges pending against him in Calcasieu Parish.

Danny Johnson met with Will Abshire and John Fryar, Chief of Detectives at the Calcasieu Parish Sheriff's Office on January 23, 1989, and agreed to provide information and assist in investigations of people in narcotics trafficking. The plan that evolved was that Danny Johnson was to approach Jerry Wayne Sewell to involve him in a "drug deal". Jerry Wayne Sewell is the father of Defendant-Appellant Jerry Wayne Sewell, II.

Danny Johnson eventually, through Jerry Wayne Sewell, involved others in his "drug deal". He was monitored by members of the Calcasieu Parish Sheriff's Office with body wires taping conversations and by physical surveillance as he travelled from Lake Charles to Vinton, Louisiana, and up to Bells, Texas and returned to Louisiana before eventually arriving at the clandestine lab site near Orange, Texas.

The only involvement of Defendant-Appellant, Jerry Wayne Sewell, II in the many hours and great distances covered which were catalogued in testimony concerning the alleged conspiracy was that he happened to be at his father's trailer in Bells, Texas on March 3.1989. This is important because no finger-prints of Jerry Wayne Sewell, II were found on glass items at

Jack Rhodes testified he stated that when the cars were loaded for the trip from Bells, Texas, to Orange, Texas, that "Darlene and Danny done most of the loading", and that he and Steven Sherrod worked on loading another car. When Jack Rhodes was asked if Jerry Wayne Sewell, II was present, he replied that he was because he had just come back from the store with his girlfriend getting cigarettes. (Vol. 9/45). When asked if Jerry Wayne Sewell, II helped in the loading. Jack Rhodes testified that the best that he could remember was that Jerry Wayne Sewell, II came over and looked. (Vol. 9 /45).

What the Statement of Facts shows is that Jerry Wayne Sewell, II has been convicted on the uncorroborated testimony of Danny Johnson, who admitted taking dope on the trip up to Bells and back, doing "bumps". Many other aspects of Danny Johnson's testimony about other co-defendants were corroborated in some way by tape recordings, testimony by other Government witness, and physical evidence indicating voluntary participation to some degree in some activity. No testimony put Jerry Wayne Sewell, II far from his father's home, and certainly not on any of the "trips", whether up to Kemp, Oklahoma, or to Dallas, Texas, or to Orange, Texas with the group, or even to rush down extra equipment to the lab when it was needed, as Darlene Roznovsky rushed down. There were no statements, no conversations, no participation in activities, no voluntary acts, no overt acts of any sort by Jerry Wayne Sewell, II to help out any of the people assembled at his father's house in any kind of drug endeavor. In fact, his was a mere shadowy, peripheral presence at his father's home. As described by Danny Johnson, Jerry Wayne Sewell, II's "in and out", "back and forth" presence is more indicative of innocent movement in his father's ho.e than of criminal activity, and is just as likely to indicate an attempt to keep away from the persons assembling at his father's home on March 7 and 8. 1989. There was insufficient evidence to sustain a conviction of Jerry Wayne Sewell, II of the three counts of the Superseding Indictment.

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OCTOBER TERM, 1992

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JERRY WAYNE SEWELL, II,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

* * * * * * * * * *

PROOF OF SERVICE

I, Linda C. Cansler, do swear or declare that on this day, January 14, 1993, pursuant to Supreme Court Rules 29.3, 29.4(a) and 29.5 I have served the REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION on each party to the above proceeding, or that party's counsl, and on every other person required to be served by depositing an envelope containing the above document in the United States mail properly addressed to each of them with first class postage prepaid.

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STATE OF TEXAS
COUNTY OF JEFFERSON

Subscribed and sworn to before me on the 14th day of January, 1993, by LINDA C. CANSLER.

Cristy Miller
Notary Public - State of Texas

NOTARY PUBLIC STATE OF TEXAS
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OCTOBER 12, 1993

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January 14, 1993

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Washington, D.C. 20543

Re: Jerry Wayne Sewell, II vs. United States
No. 92-6455

Dear Clerk:

Please file the enclosed twelve copies of Petitioner's Reply to Brief for the United States in Opposition.

Sincerely yours,

Linda Cansler

Linda C. Cansler

LCC/ch

cc: Kenneth Starr
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